

No. 3542

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

DAVID JAMES FLYNN, BARBARA FLYNN, and JOHN FLYNN, infants, by their guardian and *Prochein Ami*, HONORA DELLA FLYNN, HONORA DELLA FLYNN,

Appellants,

vs.

E. A. CHRISTENSON, HANS J. LUNVALDT, CHARLES E. SUDDEN, J. H. BAXTER, A. TAVIERA, W. B. GODFREY, JR., F. M. DELANO, WALTER V. ROHLFFS, R. L. ANDERSON, GEO. F. QUIGLEY, D. W. C. TIETJEN, CECELIA F. SUDDEN, HENRY BROOKS, R. Y. TAYLOR, ROBERT SUDDEN, JAS. JOHNSON Co. (a corporation), ALBERT ROWE, J. J. STAIGER, EDMUND JACOBS, R. C. SUDDEN, GEO. JOHNSON, JOHN L. HUBBARD, H. PILTZ, LOUIS POOLE,

Appellees.

APPELLANTS' PETITION FOR MODIFICATION
OF OPINION AND DECREE.

ANDROS & HENGSTLER,

LOUIS T. HENGSTLER,

Kohl Building, San Francisco,

*Proctors for Appellants
and Petitioners.*

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Appellees.

**APPELLANTS' PETITION FOR MODIFICATION
OF OPINION AND DECREE.**

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States Circuit
Court of Appeals for the Ninth Circuit:*

The petition of the appellants above named for a modification of the opinion and decree of this honorable

court filed and entered herein on the 2nd day of May, 1921, so as to allow the appellants to recover the costs of their appeal, respectfully shows:

I.

That on May 1, 1920, a decree was entered in this cause by the United States District Court for the Northern District of California in favor of appellants (libelants) for the sum of \$6500; being damages for the wrongful death of the husband and father of the appellants (Record p. 194).

II.

That the District Court, in making the award, found that in the death of the husband and father the appellants had suffered a loss of \$13,000, but also found that the deceased had been guilty of contributory negligence, and upon that ground held that the damages should be divided, and fixed the amount of the recovery at \$6500 (Record p. 194).

III.

That the appellants appealed to this court from the decree entered by said District Court, and assigned as errors, among others, the following:

“V.

“The court erred in holding the deceased chargeable with a want of due care.

“VI.

“The court erred in dividing the damages by reason of the want of any or all due care on the part of the deceased, and in dividing the damages at all.

“XIII.

“The court erred in dividing the amount of \$13,000, and giving to the libelants an award only on the basis of a total of \$6,500” (Record pp. 200, 201).

IV.

That thereafter this cause came on for hearing in this court and was argued by counsel for appellants and appellees and briefs were filed in behalf of said parties; that in the argument by counsel for appellants and in the briefs filed on behalf of appellants it was urged that the District Court had erred in the matters set forth in said assignments of error, that there was no evidence to support the finding of contributory negligence and that the award should have been for \$13,000, the full amount of the damage, instead of for one-half of said sum, or \$6500.00.

V.

That in said opinion filed by this court on the 2nd day of May, 1921, this court found that “the conclusion reached by the trial court regarding the alleged contributory negligence of the deceased is not justified by the record”, and held that the decree must be modified so as to allow the appellants to recover the sum of \$13,000, instead of the amount awarded by the District Court, \$6500, and as so modified the decree should be affirmed.

VI.

That no provision was made in said opinion for the recovery by appellants of their costs of this appeal.

VII.

That under Subdivision 2 of Rule 31, of the rules of this court, the effect of the affirmance of the decree of the District Court without any allowance to appellants of their costs on appeal, is to deny to the appellants the right to recover such costs and to permit the appellees to recover their costs on this appeal.

VIII.

That appellants have expended and incurred a large sum of taxable costs on this appeal, in excess of the sum of \$450.00, which they will not be able to recover from the appellees, unless this court so modifies its opinion as to permit the appellants to recover their costs on appeal; and unless said opinion is so modified, appellants will be liable to pay the appellees' costs on appeal.

IX.

Your petitioners recognize that the allowance of costs is a matter within the discretion of this honorable court, and respectfully submit that it is manifestly inequitable and unjust to appellants, in view of the errors urged by them on this appeal, and the decision of this court in their favor, which increased the amount of appellants' recovery from \$6500 to \$13,000, that appellants should be taxed with the costs of their appeal and be obliged to pay the appellees' costs.

X.

That the opinion of this court is a substantial modification of the decree of the district court, which warrants the allowance of costs to appellants.

Wherefore your petitioners pray that this honorable court will be pleased to so modify its said opinion filed and entered herein on May 2, 1921, as to permit the appellants to recover their costs on this appeal.

Dated, San Francisco,
May 25, 1921.

Respectfully submitted,

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,

*Proctors for Appellants
and Petitioners. 51*